

## AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

### **Rule 1004. Involuntary Petition Against a Partnership**

1           After filing of an involuntary petition under § 303(b)(3)  
2           of the Code, (1) the petitioning partners or other petitioners  
3           shall promptly send to or serve on each general partner who  
4           is not a petitioner a copy of the petition; and (2) the clerk  
5           shall promptly issue a summons for service on each general  
6           partner who is not a petitioner. Rule 1010 applies to the form  
7           and service of the summons.

### COMMITTEE NOTE

Section 303(b)(3)(A) of the Code provides that fewer than all of the general partners in a partnership may commence an involuntary case against the partnership. There is no counterpart provision in the Code setting out the manner in which a partnership commences a voluntary case. The Supreme Court has held in the corporate context that applicable nonbankruptcy law determines whether authority exists for a particular debtor to commence a bankruptcy case. *See Price v. Gurney*, 324 U.S. 100 (1945). The lower courts have followed this rule in the partnership context as well. *See, e.g., Jolly v. Pittore*, 170 B.R. 793 (S.D.N.Y. 1994); *Union Planters National Bank v. Hunters Horn Associates*, 158 B.R. 729 (Bankr. M.D. Tenn. 1993); *In re Channel 64 Joint Venture*, 61 B.R. 255 (Bankr. S.D. Oh.

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1986). Rule 1004(a) could be construed as requiring the consent of all of the general partners to the filing of a voluntary petition, even if fewer than all of the general partners would have the authority under applicable nonbankruptcy law to commence a bankruptcy case for the partnership. Since this is a matter of substantive law beyond the scope of these rules, Rule 1004(a) is deleted as is the designation of subdivision (b).

The rule is retitled to reflect that it applies only to involuntary petitions filed against partnerships.

**Rule 1004.1. Petition for an Infant or Incompetent Person**

1            If an infant or incompetent person has a representative,  
2            including a general guardian, committee, conservator, or  
3            similar fiduciary, the representative may file a voluntary  
4            petition on behalf of the infant or incompetent person. An  
5            infant or incompetent person who does not have a duly  
6            appointed representative may file a voluntary petition by next  
7            friend or guardian ad litem. The court shall appoint a  
8            guardian ad litem for an infant or incompetent person who is  
9            a debtor and is not otherwise represented or shall make any  
10          other order to protect the infant or incompetent debtor.

This rule is derived from Rule 17(c) F.R. Civ. P. It does not address the commencement of a case filed on behalf of a missing person. *See, e.g., In re King*, 234 B.R. 515 (Bankr. D.N.M. 1999).

\* \* \* \* \*

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

\* \* \* \* \*

## COMMITTEE NOTE

Subdivision (c) is amended to clarify that an examination ordered under Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in the manner provided in Rule 45 F. R. Civ. P., made applicable by Rule 9016.

The subdivision is amended further to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F. R. Civ. P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice, even if admitted pro hac vice, either in the court in which the case is pending or in the court for the district in which the examination is to be held. This provision supplements the procedures for the issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F. R. Civ. P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, to ease the burdens of interdistrict law practice.

**Rule 2015. Duty to Keep Records, Make Reports and Give Notice of Case**

1 (a) TRUSTEE OR DEBTOR IN POSSESSION. A

2 trustee or debtor in possession shall

3 \* \* \* \* \*

4 (5) in a chapter 11 reorganization case, on or

5 before the last day of the month after each calendar

11 \* \* \* \* \*

Subdivision (a)(5) is amended to provide that the duty to file quarterly disbursement reports continues only so long as there is an obligation to make quarterly payments to the United States trustee under 28 U.S.C. § 1930(a)(6).

### Rule 4004. Grant or Denial of Discharge

2 (c) GRANT OF DISCHARGE

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case

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6               under Rule 1017(e), the court shall forthwith grant the  
7       discharge unless:

8                       (A) the debtor is not an individual,

9                       (B) a complaint objecting to the discharge  
10       has been filed,

11                      (C) the debtor has filed a waiver under  
12       § 727(a)(10),

13                      (D) a motion to dismiss the case under § 707  
14       is pending,

15                      (E) a motion to extend the time for filing a  
16       complaint objecting to the discharge is pending,

17                      (F) a motion to extend the time for filing a  
18       motion to dismiss the case under Rule 1017(e) is  
19       pending, or

20                      (G) the debtor has not paid in full the filing  
21       fee prescribed by 28 U.S.C. § 1930(a) and any  
22       other fee prescribed by the Judicial Conference of

23                   the United States under 28 U.S.C. § 1930(b) that is  
24                   payable to the clerk upon the commencement of a  
25                   case under the Code.

26                                   \* \* \* \* \*

#### COMMITTEE NOTE

Subdivision (c)(1)(D) is amended to provide that the filing of a motion to dismiss under § 707 of the Bankruptcy Code postpones the entry of the discharge. Under the present version of the rule, only motions to dismiss brought under § 707(b) cause the postponement of the discharge. This amendment would change the result in cases such as *In re Tanenbaum*, 210 B.R. 182 (Bankr. D. Colo. 1997).

#### **Rule 9014. Contested Matters**

1       \_\_\_\_(a) MOTION. In a contested matter not otherwise  
2       governed by these rules, relief shall be requested by motion,  
3       and reasonable notice and opportunity for hearing shall be  
4       afforded the party against whom relief is sought. No response  
5       is required under this rule unless the court directs otherwise.  
6       \_\_\_\_(b) SERVICE. The motion shall be served in the  
7       manner provided for service of a summons and complaint by

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8       Rule 7004. Any paper served after the motion shall be served  
9       in the manner provided by Rule 5(b) F. R. Civ. P.

10       (c) APPLICATION OF PART VII RULES. Unless the  
11       court directs otherwise, the following rules shall apply: 7009,  
12       7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-  
13       7056, 7064, 7069, and 7071. An entity that desires to  
14       perpetuate testimony may proceed in the same manner as  
15       provided in Rule 7027 for the taking of a deposition before an  
16       adversary proceeding. The court may at any stage in a  
17       particular matter direct that one or more of the other rules in  
18       Part VII shall apply. The court shall give the parties notice of  
19       any order issued under this paragraph to afford them a  
20       reasonable opportunity to comply with the procedures  
21       prescribed by the order.

22       \_\_\_\_(d) TESTIMONY OF WITNESSES. Testimony of  
23       witnesses with respect to disputed material factual issues shall



24       be taken in the same manner as testimony in an adversary proceeding.  
25       \_\_\_\_\_(e) ATTENDANCE OF WITNESSES. The court shall  
26       provide procedures that enable parties to ascertain at a  
27       reasonable time before any scheduled hearing whether the  
28       hearing will be an evidentiary hearing at which witnesses may  
29       testify.

#### COMMITTEE NOTE

The list of Part VII rules that are applicable in a contested matter is extended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, and capacity. The discovery rules made applicable in adversary proceedings apply in contested matters unless the court directs otherwise.

Subdivision (b) is amended to permit parties to serve papers, other than the original motion, in the manner provided in Rule 5(b) F.R. Civ.P. When the court requires a response to the motion, this amendment will permit service of the response in the same manner as an answer is served in an adversary proceeding.

Subdivision (d) is added to clarify that if the motion cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held at which testimony of witnesses is taken in the same manner as testimony is taken in an adversary proceeding or at a trial in a district court civil case. Rule 43(a), rather than Rule 43(e), F.R. Civ.P. would govern the evidentiary hearing on the factual dispute. Under Rule 9017, the Federal Rules of Evidence

also apply in a contested matter. Nothing in the rule prohibits a court from resolving any matter that is submitted on affidavits by agreement of the parties.

Subdivision (e). Local procedures for hearings and other court appearances in a contested matter vary from district to district. In some bankruptcy courts, an evidentiary hearing at which witnesses may testify usually is held at the first court appearance in the contested matter. In other courts, it is customary for the court to delay the evidentiary hearing on disputed factual issues until some time after the initial hearing date. In order to avoid unnecessary expense and inconvenience, it is important for attorneys to know whether they should bring witnesses to a court appearance. The purpose of the final sentence of this rule is to require that the court provide a mechanism that will enable attorneys to know at a reasonable time before a scheduled hearing whether it will be necessary for witnesses to appear in court on that particular date.

Other amendments to this rule are stylistic.

## Rule 9027. Removal

1 (a) NOTICE OF REMOVAL.

2 \* \* \* \* \*

3 (3) *Time for filing; civil action initiated after*

4 *commencement of the case under the Code.* If a claim or

5 cause of action is asserted in another court after the

6 commencement of a case under the Code, a notice of

7 removal may be filed with the clerk only within the  
8 shorter of (A) 30 days after receipt, through service or  
9 otherwise, of a copy of the initial pleading setting forth  
10 the claim or cause of action sought to be removed, or  
11 (B) 30 days after receipt of the summons if the initial  
12 pleading has been filed with the court but not served  
13 with the summons.

14 \* \* \* \* \*

#### COMMITTEE NOTE

Subdivision (a)(3) is amended to clarify that if a claim or cause of action is initiated after the commencement of a bankruptcy case, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed.